116-398

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 988.

THE UNITED STATES, APPELLANT,

vs.

JOHN H. WALLACE.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 29, 1885.

SUPREME COURT OF THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition, filed September 5, 1884	1	1
Traverse, filed October 8, 1884	4	2
Findings of fact and conclusion of law	5	2
Opinion of the court	6	3
Final judgment	8	5
Application of defendants for, and allowance of, appeal	9	5
Certificate of clerk	10	5

6816

I. *Petition.—Filed Sept.* 5, 1884.—*J. R.*

1 In the United States Court of Claims.

JOHN H. WALLACE
vs.
THE UNITED STATES. } 14,449.

To the honorable judges of the Court of Claims:

Your petitioner, John H. Wallace, a citizen of the United States and a resident of Mobile, in the State of Alabama, respectfully shows:

That from the first day of January, 1882, to the —— day of —— 1884, he was a commissioner of the circuit court of the United States for the southern district of Alabama, duly qualified and acting.

That previous to said first day of January, 1882, the said court duly made an order requiring that each of the commissioners of said court should keep a docket, in which he should enter, on the day the transactions occurred, the issuing of each warrant, upon whose complaint and request the same was issued, the nature of the offense, and the officer to whom the warrant was delivered for service, together with the proceedings had under said warrant, the names of the witnesses present and examined, their fees, the name of the guard, if any, and his fees, and the marshal's and deputy marshal's fees, and the said order has continued in force.

That in accordance with said order your petitioner, as such commissioner, kept a docket wherein he made the entries required by said order.

Petitioner avers that during said time a large number, to wit, 875 warrants were issued by him for the apprehension of persons
2 charged with crime, and that as to each of said warrants the proper docket entries were made; that, to wit, two hundred of said docket entries were made in causes wherein issue was joined and testimony given; that, to wit, two hundred of said entries were made in causes wherein issue was joined but no testimony given; that, to wit, four hundred and seventy-five of said docket entries were made in causes which were dismissed or discontinued.

Petitioner claims that, in accordance with the provisions of sections 828 and 847 of the Revised Statutes of the United States, he is entitled to be paid by the United States three dollars for each of said causes wherein issue was joined and testimony given; two dollars wherein issue was joined but no testimony given; and one dollar wherein the cause was dismissed or discontinued; and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment, and although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to any one for him, nor has any part of the same been allowed to him in any way as a credit or set-off by any officer or Department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court, in accordance with law.

Your petitioner further shows that no assignment or transfer of said claim or any part thereof has been made by him, and that he is the lawful owner thereof; that he has at all times borne true allegiance to the Gov-

ernment of the United States, and not in any way voluntarily aided or abetted, or given encouragement to rebellion against said Government.

Wherefore your petitioner prays judgment against the defendant for one thousand four hundred and seventy-five dollars.

JOHN H. WALLACE,
By his attorney, C. C. LANCASTER,
Washington, D. C.

CHAS. E. MAYER, *Counsel.*

3 DISTRICT OF COLUMBIA:

Before me, A. S. Taylor, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney duly executed by said petitioner and filed herewith to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHAS. C. LANCASTER.

Subscribed and sworn to before me, this 5th day of September, 1884.
[SEAL.] A. S. TAYLOR,
Notary Public.

Petitioner's post-office address is Mobile, Ala.

4 II. *General traverse.—Filed Oct'r* 8, 1884.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III. *Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

The claimant, Jno. H. Wallace, was a commissioner of the circuit court of the United States for the southern district of Alabama from January 16, 1882, to November 22, 1883.

II.

October 4, 1881, the circuit court of the United States for said district, in compliance with a request by the Attorney-General, made an order requiring, among other things, that each of the commissioners of said court should keep a docket, in which he should enter on the day the transaction should occur the issuance of each warrant, the name of the person upon whose complaint and request the same was issued, the nature of the offense, and the name of the officer to whom the warrant was delivered for service, together with the proceedings had under said warrant; that there should also be entered therein the names of the witnesses present and examined and their fees, the name of the guard, if any, and his fees, and also the marshal's and deputy marshal's fees, together with the mileage and expenses allowed by law, and the said order was continued of force.

III.

From the said January 16, 1882, to November 22, 1883, petitioner, as such commissioner, issued warrants in three hundred and seventy-six cases, in three hundred and twenty-eight of which issue was joined and testimony taken, and in forty-eight of which issue was not joined, the defendant was discharged, and no testimony taken, and he duly made his docket entries in each and in all of said cases as required by said order.

IV.

His accounts for fees for keeping said docket were duly verified by oath, and presented to the said court, in presence of the district attorney, and approved by the court, and an order approving the same as being in accordance to law and just duly entered upon the records of the said court. In said accounts, as approved by the court, he was allowed a fee of $3 in each case where issue was joined and testimony taken, and $1 where issue was not joined and the defendant was discharged.

6 V.

His accounts therefor were duly presented for payment to the accounting officers of the Treasury, together with the order of court approving the same, and payment thereof was refused by them.

CONCLUSION OF LAW.

Upon the foregoing findings the court decides that the claimant is entitled to recover the sum of $1,032.

IV. *Opinion of the court.*

WELDON, *J.*, delivered the opinion of the court:

This claim is prosecuted to recover compensation for certain services rendered as commissioner of the circuit court of the United States for the southern district of Alabama, from January 16, 1882, to November 22, 1883.

The fees sued for were allowed by the circuit court for said district, but disallowed by the accounting officers of the Treasury Department.

On the 4th of October, 1881, the circuit court of the United States for said district, at the request of the Department of Justice, made an order and had it entered of record, requiring each commissioner to keep a docket in which shall be entered his proceedings in each case, the name of the witnesses, fees of marshal, the name and expense of the guard, with the mileage and expense allowed by law.

Between said periods the petitioner issued warrants in three hundred and seventy-eight cases. In three hundred and twenty-eight issue was joined and testimony heard; in forty-eight cases no issue was joined, and the defendants were discharged. For the cases in which issue was joined and testimony heard the claimant charged $3, and in cases in which no issue was joined and no testimony heard the sum of $1.

The Treasury Department having refused to pay the docket fee, as allowed by the court, the claimant filed this petition.

It is insisted by the claimant that the allowance made by the circuit court was legal under sections 847 and 828 of the Revised Statutes.

It is provided in section 847, regulating the fees of commissioners:

"For issuing any warrant or writ, or for any other service, the same compensation as is allowed to clerks for like service."

Section 828 provides that the clerk be allowed—

"For making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause when issue is joined and testimony given, $3."

And—

"For making dockets, indexes, taxing costs, and other services in a cause which is dismissed, or discontinued, or where judgment or decree is made without issue, $1."

The order of the circuit court requiring the commissioners to keep a docket was made at the instance of the Department of Justice, and was deemed necessary by that Department and the circuit court in the administration of criminal law.

Although the section of the statute prescribing and regulating the fees of a commissioner does not specifically allow a fee for the items charged, yet there is a general clause of "other services" provided for by
7 the statute which may include the right to charge as alleged in the petition of the claimant.

When services are rendered by the commissioner the compensation for which is not specifically provided for by section 847, he is remitted to the provisions of section 828, regulating the compensation allowed to clerks for like services.

The phrase "like services" does not necessarily mean identical with, for by such a construction the compensation allowed to commissioner "for any other service" would be defeated because of the subject-matter of the duties of the commissioner and the clerk being somewhat different; but the statute must receive a reasonable construction, and where the service of the clerk bears a substantial resemblance to the duty performed by the commissioner then, under 847, the commissioner would be entitled to the compensation allowed by law to the clerk, it being in legal substance a "like service."

The circuit court in the allowance of the claim must have taken this view of the law, and while this court has held that the order of the court is not binding upon the accounting officers, it is prima facie evidence of the amount due, and the only question arises is a question of law (Turner vs. The United States, 19 C. Cls., 629).

The order of the circuit court requiring the commissioner to keep a docket was a legal requirement upon the commissioner, for which service there is no specific allowance of fees by the statute; and as has been said by the Attorney-General, in a case very much like the case at bar, if a person "is compelled by law to perform a service or incur a charge in a matter not specified by the act he is to receive a reasonable allowance" (Op. Att'y-Gen., vol. 6, par. 59).

The service of keeping a docket was legally imposed on the commissioner by order of the circuit court, and became within the meaning of section 847 "other services," and in law such services were like services to the services performed by the clerk under section 828, for which compensation is allowed upon the basis adopted by the circuit court of the southern district of Alabama.

It is therefore the judgment of the court that the claimant recover the sum of $1,032.

8 V. *Final judgment.*

At a Court of Claims held in the city of Washington on the 27th day of April, A. D. 1885, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said John H. Wallace do have and recover of and from the United States the sum of one thousand and thirty-two dollars ($1,032.00).

9 VI. *Application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 27th day of April, 1885, in favor of claimant, the defendants, by their Attorney-General, on the 1st day of June, 1885, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Ass't Attorney-General.

Filed June 1, 1885.
Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

10 VII.

In the Court of Claims.

JOHN H. WALLACE
vs.
THE UNITED STATES. } No. 14449.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment, of the application of defendants for the allowance of an appeal to the Supreme Court of the United States, and the allowance thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 16th day of September, 1885.

[SEAL.] ARCHIBALD HOPKINS,
Ch. Clerk Court of Claims.

(Indorsement on cover:) No. 988. The United States, appellant, *vs.* John H. Wallace. Court of Claims. Filed September 29, 1885.

116-398

Office Supreme Court U. S.
FILED
DEC 23 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES, APPELLANTS,
vs.
JOHN H. WALLACE.
} No. 988.

BRIEF FOR THE APPELLANTS.

In the Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES APPELLANTS,
vs.
JOHN H. WALLACE. } No. 988.

BRIEF FOR THE APPELLANTS.

This suit was originally instituted by John H. Wallace against the United States, to recover $1,475, as compensation for certain services rendered as commissioner of the circuit court of the United States for the southern district of Alabama, from January 16, 1582, to November 22, 1883. Upon the findings of fact as set forth in the record, the Court of Claims decided that the claimant was entitled to recover the sum of $1,032. From that judgment the defendants have taken an appeal to this court. The error assigned is that judgment should have been rendered for the United States instead of the claimant.

It appears from the record that the fees which were sued for were allowed by the circuit court for the southern district of Alabama, but disallowed by the accounting officers of the Treasury Department. The claimant below

based his claim upon sections 847 and 828 of the Revised Statutes. Section 847, regulating the fees of commissioners, provides:

> For issuing any warrant or writ, or for any other services, the same compensation as is allowed to clerks for like services.

Section 828 provides:

> That the clerk be allowed for making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause where issue is joined and testimony given, $3; for making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, $1; for making dockets and indexes, taxing costs, and all other services in a cause where issue is joined, but no testimony is given, $2; for making dockets and taxing costs in causes removed by writ of error or appeal, $1.

It will be seen that section 847, regulating the fees of a commissioner, does not specifically allow a fee for the items charged. The claim in this instance is based upon the general clause of "other services" provided for by the statute. We submit that the allowance of such fees to a commissioner by a circuit court is not conclusive upon, but subject to, the revision of accounting officers (act February 22, 1875, 18 Stats., 333).

And our contention in this case is that under the provisions of the statute above cited "docket fees" can only be allowed to an officer of some tribunal where *issue is or can be joined*, or to an officer of a tribunal to which *a writ of error* may be issued, or from which *an appeal* may

be taken. The hearing of a commissioner is not a hearing by such a tribunal. His is merely a tribunal with power to commit or dismiss, and then send on the papers to a court of record having jurisdiction *to try the issue which is joined in the latter*. He cannot be said to render "*judgment*" which follows the *joining of issue*.

In other words, an issue cannot be said to be joined before a commissioner. A dismissal of a charge by him does not preclude subsequent indictment, since no issue has been joined and tried; whereas judgment or dismissal by a court upon issue joined does preclude such subsequent indictment. Since he is required by the court to keep a docket, his services are fully provided for by paragraph 8, of section 828, which allows for making entries, "for each folio, 15 cents."

This question seems to have been carefully considered by Hon. William Lawrence, First Comptroller, who decided that section 828 of the Revised Statutes does not authorize the payment to commissioners of circuit courts of *docket fees* such as it provides for clerks of courts. His opinion, found in vol. 4, Lawrence's Decisions, pages 393, 394, and 395, is hereto appended, to which we invite the attention of the court. It seems to us that it covers the entire ground in controversy.

Very respectfully,

JOHN GOODE,
Solicitor-General.

APPENDIX.

DECISION BY WILLIAM LAWRENCE, FIRST COMPTROLLER.

Edward M. Rand, a commissioner of the circuit court of the United States for the district of Maine, charges, in his account of fees for services in criminal examinations, a *docket fee* in each case. Since the enactment of the fee bill of 1853 (now section 828 of the Revised Statutes) other commissioners have made like charges, and the charges have uniformly been disallowed. The question is now submitted, therefore, whether the uniform practice of my predecessors on this subject shall be reversed.

The fee is claimed under the provision of section 847, which gives to commissioners "for issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services" (Rev. Stats., 828).

The statute does not specifically require a commissioner to keep a docket. But it does so, perhaps, by inference; and, if not, it is generally and properly required by order of court, on the recommendation of the Attorney-General (Rev. Stats., 360). It has always been held by the accounting officers that every commissioner should keep, in a record or docket, a brief statement of his proceedings. And, for *entering the returns of process, and orders for payment of witnesses*, and for other proper entries, the commissioners have been allowed the same compensation as is allowed to clerks for like services. The compensation authorized for such record is 15 cents per

folio, and for copies 10 cents per folio. This is entirely different from docket fees.

In January, 1882, pursuant to a recommendation of the Attorney-General (Rev. Stat., 368), the circuit court of the United States for the district of Maine made a general order, the first section of which is as follows:

> "Each commissioner of this court acting in criminal cases shall keep a docket, in which he shall enter all applications for warrants granted by him, stating briefly the nature of the offense, the name of the complainant, the date of issuing the warrant, and all subsequent proceedings thereunder; also the names of witnesses present and examined. At the foot of the docket in each case the commissioner shall enter a statement of all fees and expenses accruing in the case, including his own fees."

A like order has been made by the courts in some other districts, and it has revived the old claim for a docket fee to commissioners.

The docket fees prescribed for *clerks* by section 828, Rev. Stat., are as follows:

> "For making dockets *and* indexes, issuing venires, taxing costs, and all other services on the trial or argument of a cause, where issue is joined and testimony given, $3.
>
> "For making dockets and indexes, taxing costs, and all other services in a cause where issue is joined but no testimony is given, $2.
>
> "For making dockets and indexes, taxing costs, and other services in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, $1."

The question is, whether services performed by a commissioner in making *entries in the docket*, which the order of the court prescribes, are "like services" to those of a clerk for which *docket fees* are allowed.

In every court of record, as a general rule, *several dockets* are made, the number being generally proportioned to the amount of business transacted. Usually there is an appearance docket, a motion docket, an execution docket, a court or bar docket, and numerous others, the titles and variety of which differ in the several judicial districts. For the necessary entries in each cause in all the dockets only one fee is allowed to the clerk. The fee is not for making a docket, but the law says it is "for making dockets" *and* for "*all other* services" mentioned in connection therewith.

A commissioner has but *one* docket. He does not issue *venires*, nor does he tax costs, unless the taxation of witness fees comes under this head. It cannot properly be said that he renders judgments or decrees, within the meaning of the statute. The fee of "three dollars" prescribed for clerks of courts includes making (1) dockets, and (2) indexes, (3) issuing venires, (4) taxing costs, (5) *and* all other services. The commissioner has no "like services" of *all* these classes to perform. His docket is totally unlike any docket *made by a clerk of court*. The statute does not specifically require a commissioner to make *any docket*, and in providing fees it contemplates payment for those services only which he is required to perform.

Section 1014 of the Revised Statutes requires copies of process, together with the recognizances of the witnesses, to be returned to the proper clerk, and for this service the commissioner is entitled to compensation. It is not necessary to decide whether this section also requires a docket to be kept. The courts have generally and properly required them. The question as to compensation for making these and for transcripts is not presented for decision on the claim now made; but the commissioner is not required by law to perform "like services" as clerks in all those cases in which the latter officers are respect-

ively entitled to a fee of two dollars in one class of cases, and one dollar in another.

It is clear that the docket services, if they may be so called, of a commissioner are not similar in *all* respects to those required of a clerk. So far as the services are similar, as *for making entries* in the docket, commissioners are entitled to payment. The commissioner is not, in respect of making dockets, required to perform any "like services" as clerks, and hence is not entitled to a fee, either of three, two, or one dollar, as a clerk is, in each case disposed of, "for making dockets *and all other* services." This has been the uniform usage adopted in this office in settling the accounts of commissioners. In following it now, the practice and decisions of former comptrollers are respected and observed. No sufficient reason has been presented, or is perceived, to justify a change. There is a wide difference between the service in *making entries in a docket*, and *all the services* required of clerks for which the prescribed docket fees are paid.

The claim for a docket fee is disallowed.

TREASURY DEPARTMENT,
First Comptroller's Office, July 6, 1883.

116-398

Office Supreme Court U.S.
FILED.
JAN 4 1886
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES,
Appellant,
vs.
JOHN H. WALLACE,
Appellee.

No. 988.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Attorney for Appellee.

CHARLES E. MAYER,
of Counsel.

Beresford, Printer, Washington.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE UNITED STATES,
Appellant,
vs.
JOHN H. WALLACE,
Appellee.
No. 988.

BRIEF FOR APPELLEE.

THE FEES ARE AUTHORIZED BY SECS. 828 AND 847, REV. ST.

In addition to the opinion of the Court of Claims in this case, we ask the attention of the Court to the case *In re* Rand (Federal Reporter, vol. 18, p. 99,) wherein Judges Lowell and Webb, having before them the opinion of the Comptroller in the same matter (which the Solicitor General makes a part of his argument) decide, for the *third* time, that certain fees of the class in question are authorized by law, and should be allowed to the Commissioner.

We can add nothing to the reasons given by these courts in support of the position that the allowance of docket fees to commissioners is authorized and provided for by Sections 847 and 828 of the Revised Statutes.

The fee of fifteen cents per folio, which the Comptroller proposes to allow, would not be adequate compensation, because it would not only take many docket entries to make

a hundred words, but there would be no compensation for the labor and responsibility of ascertaining and deciding as to the fees and expenses of witnesses, guards, the marshal and his deputies. (II, Findings of Fact, R., p. 3.)

II.

Issue Could be and was Joined Before the Commissioner.

The objection that issue was not and could not be joined before the commissioner is made for the first time in this Court. The lower court found, as matter of fact, that issue was joined in a large number of cases, and this finding was without objection and not even questioned by the defendant. (III, Find. of Fact, R., p. 3.)

When the accused was brought before the commissioner, under the warrant for his arrest, there was one of two courses open to him. He could either waive an examination, and thus, without further contention, consent to be held to answer to the charge contained in the warrant, or he could demand an examination. If he adopted the latter course, testimony would be taken on behalf of the prosecution, and perhaps on the part of the defense. For what purpose? Clearly to determine an issue—an affirmative allegation on the part of the the prosecution, and a denial thereof on the part of the defense. The prosecution would affirm that the evidence was sufficient to create a reasonable probability of the guilt of the accused and the prisoner would deny it. This would make an issue. (Bouvier's Law Dictionary; Coke Litt., 126 A; Bacon Abr., Pleas, (G. 1:) 5 Peters, 149; 2 W. Blackst., 1312.)

III.

Even if the Fees were not provided for by the Statute, the Court had Authority to Allow them.

If compensation to the commissioner for the services rendered had not been provided for by the act, the court would not be prohibited from allowing such compensation. It is true, that by section 823 of the Revised Statutes, the compensation of commissioners and other officers of the court is limited to the fees expressly provided, for services specified. This section was originally a part of the act of February 26, 1853, U. S. S., Vol. 10, p. 161. In the same year of its passage Attorney General Cushing, construing the act, held that it did not prohibit compensation to an officer for services not specified in the act. (Opinions Atty's Gen., Vol. 6, p. 58.)

In 1859 Judges Nelson and Betts, of the Circuit and District Court for the Southern District of New York, made rules of court, allowing fees to Commissioners in case of reference, which were not provided for in the act of 1853. (4 Blatchford, appendix, p. 515.)

In *ex parte* Jeffrey (1869) Judge Lowell allowed counsel fees not provided for in the act. (1 Lowell, 321.)

This power must lie with the courts, otherwise they would at times be put in the predicament of having either to refuse to exercise judicial functions or to require of their officers the gratuitous performance of onerous and responsible duties.

IV.

The Approval by the Court of the Accounts of the Commissioner is Conclusive upon the Comptroller, and Cannot be Reviewed by Him.

The act of February 22, 1875, (U. S. S., v. 18, p. 333, Part III,) under which the accounts of the Commissioner

were approved, requires that the accounts, with the vouchers and items thereof, shall be rendered in open court, in presence of the district attorney, and that proof shall be made to the satisfaction of the Court that the services therein charged have been actually and necessarily performed as therein stated; and the Court is then required to enter of record an order approving or disapproving the accounts, "as may be according to law and just." And the accounts of appellee were approved by the Circuit Court in accordance with this law. (III, Finding of Fact, Record, p. 3.)

It will be seen that under the act the *Court*, and not the *Judge* of a Court, is required to pass upon the accounts of the Commissioner, and its decision in reference thereto is required to be made a part of its records.

Now, Congress has not the power, under the Constitution, to impose upon a court any other than a judicial function, and if the function is judicial it cannot be made the subject of review by an Executive Department of the Government. The duty imposed upon the Court by the act of 1875 to pass on the fees of its own officers, in the manner provided, is clearly judicial. This being so, it cannot be made the subject of revision or review by an Executive officer. In support of this proposition we refer to the remarkable note to Hayburn's case, (2 Dallas, p. 410.) We can add nothing to the conclusive reasoning of the many learned judges who found it impossible, under the Constitution, to carry out the provisions of a beneficent act for the relief of revolutionary soldiers, because, by the act, their opinions were subjected to review by Congress and the Secretary of War. It will be observed that the statute which was under consideration in Hayburn's case, (sec. 2, act March 23, 1792, 1st U. S. S., p. 243,) did not require, in terms, that the Court should render judgment, but only that the "opinion" of the Court should be transmitted to the Secretary of War, who was authorized to review the action of the Court when he had cause to suspect imposition or mistake. The action of the

Court by this statute was not, as in the act under consideration, required to be made a part of the records of the Court.

In the case of the United States *vs.* Ferriera, (13 Howard, p. 40,) the duty was imposed by the act upon the *judge*, and not upon the *court*, and being made reviewable by an executive officer, the acts of the judge were held by this court not to be judicial, and therefore not appealable to this court.

In 1849 Attorney General Reverdy Johnson had occasion to pass upon the power of the Comptroller to review the certificate of the President of the Senate in relation to the pay and mileage of Senators. He shows (see 5th Opinions of Attorneys General, p. 205 *et seq.*) that it was the unanimous opinion of all the members of the Supreme Court at that time, that under the law as it then was, the Comptroller had no authority to review the certificate of the judge in relation to fees of officers. The law then in force was the act of 1792. (Sec. 4, vol. 1, p. 277 U. S. S.) By this act it was provided that the accounts should be examined and certified by the *court* or by the *judge*, and then "should be passed in the usual manner at, and the amount thereof paid out of, the Treasury of the United States." By an examination of the opinion referred to it will be seen that the effect of the certificate of a *judge* only, and not of a *court*, is discussed, doubtless because it must have been considered too well settled to admit of controversy, in view of the opinions expressed in the Hayburn case, that the certificate of a court could not be reviewed by the Comptroller.

The act of 1792 was superseded by that of 1856 (Sec. 846 Rev. Stats.), which imposed upon "the district judge of the district" the duty of certifying to the accounts, and provided that they "should be subject to be revised on their merits, as in the case of other public accounts." The certificate under this act might, perhaps, be held to be reviewable by the Comptroller on the theory that the judge acted as a commissioner and not judicially. But it would appear impossible to reconcile this theory with the views of Mr. Johnson and the members of the Supreme Court. No

apology is needed for referring to these extra-judicial opinions, because—the Court of Claims not then being in existence—it was hardly possible to obtain judicial determination of the question.

Therefore, that part of the present act, which provides that "nothing contained in this act shall be deemed in anywise to diminish or affect the right of revision of the accounts, to which this act applies, by the accounting officers of the Treasury as exercised under the laws now in force," (last clause of Sec. 1 act of Feb'y 22, 1875, 18 U. S. S., p. 333.) must be held as inoperative, to the extent that it would confer upon an executive officer the power to revise and annul decisions of the courts in the premises.

CHARLES C. LANCASTER,
Attorney for Appellee.

CHARLES E. MAYER,
of Counsel.

116-407

IN THE SUPREME COURT, OF THE UNITED STATES.

OCTOBER TERM, 1885.

NO.....ORIGINAL.

Ex-parte in the matter of the petition of L. D. BROWN and LEANDER HOLMES for a Writ of Mandamus.

vs.

The Supreme Court of the Territory of Washington:

The Honorable ROGER S. GREENE, Chief Justice, and the Honorables S. C. WINGARD, JOHN P. HOYT and GEORGE TURNER, Associate Justices thereof,

Respondents.

MOTION

For leave to file petition for a mandamus.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners respectfully ask this Honorable Court for leave to file a petition for a mandamus. Copy hereto attached.

LEANDER HOLMES,
and

Attorneys for Petitioners.

116-401

IN THE
SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1885.

No._____Original.

EX PARTE, IN THE MATTER OF THE PETITION OF L. D. BROWN AND LEANDER HOLMES FOR A WRIT OF MANDAMUS.

vs.

THE SUPREME COURT OF THE TERRITORY OF WASHINGTON, THE HONORABLE ROGER S. GREENE, CHIEF JUSTICE, AND THE HONORABLES S. C. WINGARD, JOHN P. HOYT, AND GEORGE TURNER, ASSOCIATE JUSTICES THEREOF, RESPONDENTS.

PETITION.

LEANDER HOLMES,
Counsel for Petitioner.

F. W. Baltes & Co., Printers, 110 Front St, Portland, Or.

IN THE

SUPREME COURT,

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

NO.....ORIGINAL.

Ex-parte in the matter of the petition of L. D. BROWN and LEANDER HOLMES for a Writ of Mandamus.

vs.

The Supreme Court of the Territory of Washington:

The Honorable ROGER S. GREENE, Chief Justice, and the Honorables S. C. WINGARD, JOHN P. HOYT and GEORGE TURNER, Associate Justices thereof,

Respondents.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of L. D. Brown and Leander Holmes respectfully shows to this Honorable Court:—

First, that they are citizens and residents of the city of Portland, State of Oregon.

Second, that on the 10th day of July, 1884, your

petitioners as plaintiffs commenced a suit in ejectment against one William Rank, as defendant, for the possession of sixty-four acres of land, by filing the following complaint:

TERRITORY OF WASHINGTON,
COUNTY OF CLARKE. } -ss.

In the District Court, of the Second Judicial District of Washington Territory, holding terms at Vancouver for the November term, 1884.

L. D. BROWN AND LEANDER HOLMES,
Plaintiffs.
vs.
WILLIAM RANK,
Defendant.

And now comes the plaintiffs herein and for cause of action allege that they are the owners in fee of the land described in this complaint.

Said land being a portion of land in Clarke county, Washington Territory, that was on the 13th day of October, 1877, patented to Amos M. Short and to his heirs. The parcel of land in the controversy in this action is described as follows, to-wit: Beginning at a point 18 chains west of the northwest corner of Esther Short's donation claim, patented to her and her heirs in 1877; running thence west nine chains; thence south to the north bank of the Columbia river; thence along the bank of said river up stream 10 chains and 90 links; thence north to the place of beginning; containing 64 acres more or less, excepting one acre deeded to Eugene Semple.

Plaintiffs allege that they are entitled to the possession of said described parcel of land. That defendant is now and has been in the possession of said land for the last six years, receiving the rents and profits thereof, and wrongfully withholds the possession of the same from the plaintiffs to their damage in the sum of one thousand dollars.

Wherefore plaintiffs pray for judgment against defendant; that the plaintiffs be adjudged to be the owners in fee of said parcel of land; that they be awarded the immediate possession thereof, and that defendant pay the plaintiffs the sum of one thousand dollars for the use and detention of said property, and that defendant pay the costs and disbursements of this action.

LEANDER HOLMES,
Attorney for Plaintiffs.

Your petitioners would further represent that they did on the said 10th of July, 1884, commence a second suit in ejectment in the same Court, county and Territory, against one G. T. McConnell, as defendant, for the possession of 35 acres of land, described as situate in said county and Territory, and for damages in the sum of $800 and for costs of suit.

Also your petitioners did on said 10th day of July, 1884, as plaintiffs, commence a third suit in ejectment in the same Court, county and Territory, against one Wm. C. Hazard, as defendant, for the possession of 45 acres of land, situated in said county and Territory, and for damages in the sum of $1,000 and for costs of suit.

Your petitioners further represent that the complaint, the answer and the demurrer in each and all of the above causes were and are the *same*, except as to *names* of *defendants*, *description* and *amount* of land. And

that all questions of title, of law and equity are the same in each cause, and are so plead; and that the ruling of the District Court on demurrer in the *cause argued* and the notice of appeal taken was by consent of parties entered on the journal as the ruling and decision of the Court on demurrer in *each of the three causes;* and also in the Supreme Court the same motion *to dismiss* was made in each of the three causes, and after ruling by the Supreme Court on this motion in the case of William Rank, No. 422. The same ruling by consent of parties was made and entered by the Court in the other two causes aforesaid, No. 423 and No. 424.

And your petitioners most respectfully submit that the ruling or decision of this honorable Court on this application for a writ of mandamus to the Supreme Court of Washington Territory, in the case of L. D. Brown et al. *vs.* William Rank, No. 422, may also be applied to the case of L. D. Brown et al. *vs.* G. T. McConnell, No. 423, and to the case of L. D. Brown et al. *vs.* William C. Hazard, No. 424.)

* * * * * * * *

That at the November term, 1884, William Rank filed in said cause the following answer:

In the District Court of the Second Judicial District of Washington Territory, holding terms at Vancouver.

L. D. BROWN and
LEANDER HOLMES,
Plaintiffs,

vs.

WILLIAM RANK,
Defendant.

The defendant in the above entitled action makes answer to complaint of plaintiffs as follows:

Defendant denies that plaintiffs, or either of them, are, or ever were, owners in fee or otherwise of the land described in their complaint, or of any part thereof ;

Denies that plaintiffs, or either of them, are, or ever were entitled to the possession of said land, or any part or parcel thereof ;

Denies that defendant wrongfully withholds possession of said land, or any part thereof from plaintiffs, or either of them, or has at any time wrongfully withheld possession thereof from plaintiffs, or either of them, to their damage in the sum of one thousand dollars, or in any sum, or otherwise ;

Denies that plaintiffs have, or ever had, an interest in or right to possession of the land described in their complaint, or any part or parcel thereof.

And for further answer and separate defence the defendant alleges that for a long time prior to, and at the time of the commencement of this action, defendant was, and ever since has been, and now is, the owner in fee and entitled to the possession of the whole of the parcel of land described in the complaint, and that he acquired the same by *purchase and conveyance as hereinafter set forth.*

2. And for further separate answer and defence defendant alleges that neither the plaintiffs nor those under whom they claim, or any of them, were seized or possessed of the land in controversy and described in the complaint, or of any part thereof, at any time within ten years next preceding the commencement of this action, but that this defendant and those under whom he claims have been continuously in the actual, exclusive, visible

and notorious possession thereof under claim and color of title in good faith for more than twenty years next preceding the commencement of this action.

That, while thus in possession of said land, holding the same adversely, the defendant and those under whom he claims made permanent improvements in good faith upon said land of the value at this time of $3000, which sum the defendant claims as a set-off against any damages which plaintiffs may have sustained, or may be entitled to recover by reason of the alleged withholding of possession thereof.

3. And for further answer and separate defence, the defendant alleges:—

That the only claim of title which plaintiffs have or make to the parcel of land described in their complaint is claimed and pretended by them to be derived through, under and by virtue of certain quit-claim deeds, executed and delivered by Grant H. Short and others, the children and heirs at law of Amos M. and Esther Short, deceased, to one, Samuel R. Whipple, in 1877 and 1878. That at the the time of the execution and delivery of said deeds, and each of them, the grantors were and for a long time had been out of possession of said land, and this defendant was in the actual, exclusive, visible and notorious possession thereof under color of title in good faith, and that he and those under whom he claims had been continuously so in possession of said land for more than twenty years next preceding the commencement of this action, and defendant alleges that each and all of said deeds were and are inoperative and void as against the defendant and those under whom he claims.

4. And for further answer and separate defence, and addressing the same to the Honorable Judge of the

above entitled Court, the defendant alleges and shows to the Court :—

That on or about the 19th day of January, A. D. 1853, Amos M. Short died intestate at Vancouver, in Clarke County, Oregon Territory, [now Washington], leaving him surviving ten children, his only heirs at law, to wit: —Samantha Morse, wife of Henry C. Morse ; Jerusha Shockley, wife of J. P. Shockley ; Druzilla Burlingame, wife of H. S. Burlingame ; Amos C. Short ; Maxey B. Short ; Alfred D. Short ; Grant H. Short ; Hannah E. Short ; Curtis F. Short ; Matilda Lawrence, wife of Andrew J. Lawrence ; and Esther Short, his widow and the mother of said children.

That in his lifetime, on the 8th day of March, 1848, the said Amos M. Short and said Esther Short, his wife, settled upon that certain tract of land in Oregon Territory known as claim No. 51, described in notification No. 446 in the office of the register and receiver at Vancouver, Clarke county, W. T., claiming the same as their donation claim under the provisions of the act of Congress, entitled "An Act to Create the Office of Surveyor General of the Public Lands in Oregon and to Provide for the Survey, and to make donations to settlers of the said public lands," approved September 27th, 1850.

That the parcel of land described in the complaint in this action is a part of the west half of said donation claim, allotted to the husband, Amas M. Short, by the officers of the land office at Olympia, W. T., in accordance with section 4 of said act of Congress.

That thereafter, from the said 8th day of March, 1848, the said Amos M. Short and Esther Short resided upon and cultivated said donation land claim for four consecutive years, and otherwise conformed to all the condi-

tions of said act up to the time of the death of said Amos M. Short, January 9th, 1853.

That afterwards, on or about the 4th day of October, 1853, the said Esther Short caused to be filed in the office of the surveyor general at Oregon City, Oregon, the said notification No. 446, describing said donation land claim, and showing that the said Amos M. Short was a qualified settler and competent as a married man to take said claim.

That after the death of said Amos M. Short, Esther Short, his widow, continued to reside upon said land claim until her death, June 28th, 1862.

That on the 12th day of December, 1854, the said Esther Short was by the Probate Court of Clarke county, Washington Territory, duly appointed administratrix of the estate of said Amos M. Short, and duly qualified as such, and acted as such under letters duly issued to her by said Court on December 18th, 1854, until June 9th, 1856.

That while acting as such administratrix she disposed of most of the personal property of said estate and paid all debts and claims against the same, under the orders of said Court.

That on the 18th day of December, 1854, the said Esther Short was by the Probate Court aforesaid appointed guardian of the person and estate of Maxey B. Short, Grant H. Short, Matilda Short, Hannah E. Short and Alfred D. Short, the children aforesaid, who were then minors, living with the said Esther Short, in said county and on said donation land claim, and was and continued to be such guardian until June 9th, 1856.

That in 1855 it was mutually agreed by and between

the said Esther Short and the aforesaid ten children of the said Amos M. and Esther Short, that the east half of said donation land claim should belong to, and be taken and held by the said Esther Short as her portion of said claim, and that the west half thereof should belong to, and be taken and held by the ten children in equal proportions as their part of said donation claim, which said agreement was at all times and ever afterwards recognized, acted on, acquiesced in, and adhered to, by each and all the parties thereto.

That on the 9th day of June, 1856, the said Esther Short was by the aforesaid Probate Court duly reappointed guardian of the person and estate of the said Maxey B. Short, Grant H. Short, Matilda Short and Hannah E. Short, and was such guardian at the times hereinafter mentioned, under letters of guardianship issued by said court.

That on the 14th day of June, 1856, J. P. Shockly was by said Probate Court appointed guardian of the person and estate of Alfred D. Short, and was such guardian and acted as such, under letters of guardianship, duly issued, at all the times hereinafter mentioned.

That on the 9th day of June, 1856, the administration of said estate being incomplete and the said Esther Short having surrendered her letters of administration, Henry S. Burlingame, the husband of Duzilla Burlingame, was by the Probate Court aforesaid duly appointed administrator *de bonis non* of the estate of said Amos M. Short, deceased, and then and there qualified and entered upon the duties of his office as such administrator.

That the estate of said deceased remaining unadmin-

istered, consisted of a small surplus of personal assets, and, as appeared from the inventory taken and filed by Esther Short, adm., February 13th, 1885:

"Land Claim," appraised at four thousand dollars.

That on the 28th day of July, 1856, the aforesaid Samantha Morse and her husband, Henry C. Morse, Druzilla Burlingame, and her husband, Henry S. Burlingame, Jerusha Shockley, Amos C. Short, J. P. Shockley, as guardians of Alfred D. Short, and the said Esther Short as guardian of Maxey B. Short, and Esther Short as guardian of said Grant H. Short; and Esther Short as guardian of said Hannah E. Short; and Esther Short as guardian of said Matilda Short (afterwards Matilda Lawrence); made and signed and presented to said Probate Court their petition in writing, praying that partition be made of the real estate in said county of Amos M. Short, deceased, amongst his said children and heirs at law, so that each might have and hold his and her portion separately

That Thereupon one William Kelly was by said Court duly appointed agent for Curtis F. Short, one of said children and heirs at law, of full age, residing in the State of Texas; that said Kelly then and there qualified as such and was authorized by said Court to represent, and did represent, the rights and interests of the said Curtis F. Short in the subsequent proceedings and partition.

That the real estate referred to in the aforesaid petition and of which partition was desired and made as hereinafter stated, was and is the west half of the aforesaid donation claim of Amos M. and Esther Short, No. 51, mentioned in the complaint in this action, and this was well known and understood at the time by all who

were interested or concerned in said partition proceedings.

That thereupon on the 28th day of July, 1856, said petition having been considered and granted, Lewis Van Vleet, David Parker and Levi Douthit, three disinterested persons, were appointed by said Court commissioners to appraise and divide the said real estate of Amos M. Short, deceased, among his said ten children and heirs.

That said commissioners were then and there duly sworn to the faithful discharge of their duties, and a warrant was issued to them by said court, together with a notice of the appointment of the said William Kelly as agent for Curtis F. Short.

That notice was duly given by said commissioners to all persons interested in said partition, their guardians and agents, of the time when the said commissioners would proceed to make partition, to wit.. August 2nd, 1856.

That on the said 2nd day of August, 1856, said commissioners met on the west half said donation claim and proceeded to make survey of the said west half and found the same to contain three hundred and twenty-one (321) acres, one (1) rod and seventeen (17) perches, and appraised the same at four thousand and nine hundred (4,900) dollars.

That they then proceeded to make partition thereof and caused said west half to be divided into ten parts of equal width east and west. That said ten parts were surveyed and designated as lots, numbered from lot No. 1, on the west side of the same, to lot No. 10, on the east side thereof, inclusive.

That lot No. 1, containing 25 acres, 1 rod and 2

perches, valued at five hundred (500) dollars, was selected by Henry C. and his wife, Samantha Morse, and was allotted to her as and for her share.

That lot No. 2, containing 36 acres, 2 rods and 37 perches, valued at five hundred and fifty (550) dollars, was selected by J. P. Shockley and his wife, Jerusha Shockley, and was allotted to her as and for her share.

That lot No. 3, containing 28 acres, 2 rods and 24 perches, valued at four hundred (400) dollars, was selected by the said Henry S. Burlingame and his wife, Druzilla Burlingame, and was allotted to her as and for her share.

That lot No. 4, containing 30 acres, 1 rod and 15 perches, valued at fifteen hundred (1500) dollars, was selected by the said Amos C. Short, and was allotted to him as and for his share.

That lot No. 5, containing 31 acres, 3 rods and 21 perches, valued at four hundred (400) dollars, by said Esther Short, as guardian for Maxey B. Short, and was allotted to him as and for his share.

That lot No. 6, containing 33 acres, 2 rod and 4 perches, valued at three hundred (300) dollars, was selected by J. P. Shockley, as guardian of Alfred D. Short, and was allotted to him as and for his share.

That lot No. 7, containing 34 acres, 2 rods and 10 perches, valued at three hundred (300) dollars, was selected by Esther Short, as guardian of said Grant H. Short, and was allotted to him as and for his share.

That lot No. 8, containing 35 acres, 3 rods and 9 perches, valued at two hundred and fifty (250) dollars, was selected by Esther Short, as guardian of the said Matilda Short (now Lawrence), and was allotted to her as and for her share.

That lot No. 9, containing 36 acres, 5 rods and 34 perches, valued at three hundred (300) dollars, was selected by Esther Short, as guardian of the said Hannah E. Short, and was allotted to her as and for her share.

That lot No. 10, containing 37 acres, 3 rods and 22 perches, valued at four hundred (400) dollars, was selected by the said William Kelly as agent for the said Curtis F. Short, and was allotted to him as and for his share.

That the allotments thus made where then and there assented to by each and all of said children, their guardians, agents and husbands, and by the said Esther Short.

That on the 17th of August, 1866, said commissioners made report in writing to said Probate Court, of their doings in the premises, showing the survey, appraisement, partition and other matters as above set forth, with a plat thereof, which said report is now, and ever since has been, of record in said court.

Thereupon, those of said children and heirs, whose allotments were of greater value than others, paid owelty to those whose allotments were of less value, and thereby made said allotments equal in value.

That the sums of money so paid as owelty amounted to $1,080, no part of which has ever been repaid, or offered to be repaid by those who received the same or by any one.

That on the 15th day of October, 1866, the said Probate Court confirmed said report, and made a decree, establishing the same, in substance as follows:

"The commissioners having awarded to the heirs of Ann M. Short, deceased, certain quantities of real

estate, as shown by their report now on file in this office, the heirs having agreed to the same, the court does hereby order and decree that the report and division made by said commissioners on the estate of Amos M. Short, deceased, shall be final, and that each heir named in said report shall have in their own right the property set apart to them."

That on the 18th day of October, 1856, said report, survey, plat, etc,, were recorded in the Auditor's office of Clarke county, Washington Territory, in book of deed, and have ever since remained of record in said office.

And defendant says that the partition, so made as aforesaid, was fair and equal, and was at said time fully and understandingly assented to by each and all of the parties interested therein, and that each and all of them, as well as the said Esther Short, have ever since acquiesced therein, and by various acts and deeds, done and made since said date and since all was of full age and competent so to do, have ratified and confirmed said partition. That each and all of them, immediately after the making of said partition, took possession of his and her allotment in severalty, and exercised the usual acts of ownership over the same in accordance with said partition without objection from any one.

That in October, 1857, Samantha Morse and H. C. Morse, her husband, sold and conveyed the aforesaid lot No. 1 to one David Parker, for the sum of nine hundred (900) dollars.

That in March, 1858, Jerusha Shockley and J. P. Shockley, her husband, sold and conveyed said lot No. 2 to the said Esther Short for the sum of twelve hunhundred (1,200) dollars.

That in April, 1865, Druzella Burlingame and H. S. Burlingame, her husband, sold and conveyed lot No. 3 to one S. R. Whipple, for the sum of one thousand (1,000) dollars.

That in November, 1859, Amos C. Short and wife, sold and conveyed lot No. 4 to one Leander Holmes, for the sum of about three thousand (3,000) dollars.

That in June 1867, Maxey B. Short, being of full age, sold and conveyed lot No. 5 to this defendant for the sum of aight hundred (800) dollars.

That in November, 1864, Alfred D. Short sold and conveyed lot No. 6 to Julius Suiste, (subject to a mortgage previously given by said Short) for the sum of six hundred (600) dollars, which said lot No. 6 was in January, 1875, sold and conveyed by the grantees of the said Julius Suiste to this defendant.

That the two lots last named, to wit: Lot No. 5 and lot No. 6, constitute the parcel of land described in the complaint in this action, and include the whole of said parcel of land.

That in April 1865, Curtis F. Short, who was then the duly qualified and acting guardian of Grant H. Short, sold and conveyed, as such guardian, under the orders of the Probate Court of said county, lot No. 7 to one Nicholas Schofield, for the sum of seven hundred and eighty-five (785) dollars.

That in March, 1867, Matilda Lawrence and A. J. Lawrence, her husband, sold and conveyed lot No. 8 to one Gay Hayden, for the sum of six hundred (600) dollars.

That in November, 1869, the said Hannah E. Short, then of full age, sold and conveyed lot No. 9 to one James E. Wyche, for a valuable consideration.

That in 1858, Esther Short as attorney in fact of the aforesaid Curtis F. Short, sold and conveyed seven acres of lot No. 10, to one Rufus Ingles, for five hundred (500) dollars; and in April, 1860, the said Curtis F. Short, in person, sold and conveyed the remainder of said lot No. 10 to E. A. Slocum and C. W. Slocum for twelve hundred (1,200) dollars.

That the deeds conveying said ten lots aforesaid were all recorded in the Auditor's office of Clarke county, W. T., at about the date of their execution.

That said ten lots of land mentioned, from No. 1 to No. 10, inclusive, constitute the west half of the donation claim No. 51, of Amos M. and Esther Short, referred to in the complaint in this action, and of which partition was made as aforesaid in 1856.

Defendant further says: That on the 26th day of May, 1860, the map of the survey of public lands, including said donation claim, was duly approved by the Surveyor General of said Territory, and on the 10th day of June, 1860, the final proofs of settlement, residence upon and cultivation of said donation claim by the said Amos M. Short and Esther Short, and of their compliance with the conditions of the aforesaid act of Congress, were duly made and filed in the office of the Register and Receiver at the land office in Olympia, W. T. And on the 31st day of July, 1874, a donation certificate No. 275, was issued by said Register and Receiver, in and by which the west half of said claim was assigned to the husband, the said Amos M. Short, and the east half thereof to the wife, the said Esther Short, who died June 28th, 1862.

That on the 13th day of October, 1877, a patent from the United States, under the aforesaid act of Congress,

was duly issued to said Amos M. Short and Esther Short, for said donation claim, in and by which the west half was given and donated to the said Amos M. Short and to his heirs, and east half to the said Esther Short and to her heirs.

That each and all of the aforesaid children and heirs-at law, who were represented by guardian at the times hereinbefore stated were minors at said times, but that each and all of them arrived at the age of majority more than twelve years ago.

Defendant further says, that the alleged title of plaintiffs is derived from, under and through the said Amos M. Short and Esther Short and their heirs, and by virtue of the title acquired by them as donees of the United States under the act of Congress hereinbefore mentioned, and not otherwise.

Wherefore, defendant prays that inquiry may be made into the matters and things, herein alleged and set forth, and if, upon such inquiry, said matters and things shall be found to be true, then that the defendant may be adjudged to be the legal and *equitable* owners of the parcel of land described in the complaint, and entitled to the possession thereof; that plaintiffs have no title and that they take nothing by their said action; or that such other or further judgment or decree may be rendered as may be just and proper in the premises; and that defendant have judgment for his costs and disbursements.

B. F. DENNISON,
Attorney for Defendant.

TERRITORY OF WASHINGTON, }
COUNTY OF CLARK, }

I, William Rank, being duly sworn, say, that I am the defendant in the above entitled action; that I have read the foregoing answer, and that the matter and things therein stated and set forth are true as I believe.

Subscribed and sworn to before me }
this day of , 1884. }

To which answer your petitioners filed a demurrer as follows:

WASHINGTON TERRITORY, }
COUNTY OF CLARK. }

In the District Court of the Second Judicial District of Washington Territory, holding terms at Vancouver, November term, 1884.

L. D. BROWN and L. HOLMES,
Plaintiffs,
vs.
WILLIAM RANK,
Defendant.

And now comes the plaintiffs and demurs to the second, third and fourth separate answers and defences of defendant herein, for the reason that they do not state facts sufficient to constitute a defence to this action.

LEANDER HOLMES,
Attorney for Plaintiffs.

This demurrer, was overruled by the District Court,

and your petitioners as plaintiffs therein excepted at the time and gave notice of appeal in open court to the Supreme Court of the Territory. All of which was entered of record in the journal as follows, in each cause:

L. D. BROWN *et. el.*,
Plaintiffs.
vs.
WILLIAM RANK,
Defendant.

"This case coming on for hearing upon demurrer to the answer, and having been submitted to the Court on briefs of counsel of plaintiffs and defendant, and the Court having fully considered the questions presented by the pleadings on file in this case, overrules the demurrer to the answer, to which ruling or decision the counsel for plaintiffs then excepted, and gave notice of his intention to appeal, and the counsel for plaintiffs having elected to stand upon the ruling of the Court upon said demurrer and not to reply or further plead to the answer. The case is now here dismissed with costs against the plaintiffs to be taxed, and that execution issue therefor. Whereupon counsel for plaintiffs excepted and gave notice of appeal to the Supreme Court."

That thereafter the clerk of said District Court did make and certify a full and complete transcript in this and other said causes including the journal entries thereunto appertaining, which were filed with the clerk of the Supreme Court within the time allowed by law, and was docketed in said Supreme Court at the July term, 1885, and numbered 422, and No. 423 and 424, on the docket of said Court.

That at the July Term, 1885, of said Supreme Court, to which said causes were removed under the act of November 23d, 1883, and docketed as aforesaid. The appellee in said causes by their attorney of record filed in each of said cases a motion to dismiss the appeal, of which motion the following is a full and correct copy.

In the Supreme Court of Washington Territory:

L. D. BROWN and
LEANDER HOLMES,
Appellants,
vs.
WILLIAM RANK,
Appellee.

MOTION.

The appellee appearing specially for the purpose of this motion and not otherwise, moves to dismiss the appeal for the following reasons:

1st. Because the action is an action at law, and the questions raised by the demurrer and decided by the District Court are purely questions of law, which can be re-examined by this Court only on writ of error.

2d. Because no judgment, order or decision was made or entered in the case, which can be reviewed by this Court on appeal.

3d. Because the appeal is not taken in the manner prescribed by the Statute.

B. F. DENNISON,
Attorney for Appellant.

Which motion, after a brief argument, was sustained by said Supreme Court, on July 18th, 1885, in the following

OPINION:

"In the Supreme Court of the Territory of Washington:

JULY TERM, 1885.

L. D. BROWN, ET AL.,
Appellant.
vs.
WILLIAM RANK,
Defendant.

BY THE COURT:

"Gazing at this motion to dismiss, we see but a single question necessary to its decision, namely: whether this cause is to be deemed one in equity, or one at common law. Our *rules* require an assignment of errors in a law, but none in an equity cause. Dismissal of the appeal would be the natural sequence of holding this to be a cause at law—for there is no assignment of errors here. We gather from the record, that the appellants who were plaintiffs below, are seeking to open up a judgment rendered upon overruling a demurrer to the answer. In answering, defendant, besides denials, pleaded four affirmative defenses; to the three last of which plaintiff interposed a demurrer. Legal and not equitable, all these defenses are conceded to have been, unless the fourth, which was addressed to the judge, and was apparently intended as a plea of equitable estoppel. Let the intent as to the last have been what it

may, '*the matter pleaded did not in our opinion display facts sufficient to constitute a defense of any description.*' Jurisdiction is to be determined by presuming everything to be of common law cognizance. Until the necessity of invoking equitable jurisdiction appears, unless we are to give an unreasonable force to the address of the fourth defense to the judge, we are unable to see any necessity for him to act in the capacity of Chancellor, in deciding the demurrer. Decision of the demurrer was, we think, a decision at law. Getting the cause here for review of that decision is a proceeding in the nature of a writ of error. Errors, therefore, should have been assigned, conformably to Rule 5th. Appeal dismissed.

ROGER S. GREEN, C. J.
S. C. WINGARD, AND
GEORGE TURNER,
Associate Justices."

Whereupon judgement was entered up in said Supreme Court, against your petitioners, for costs of suit, taxed at $40 in each cause, and that execution issue therefor.

To which ruling and judgment of the Court, appellants, by their counsel, excepted, and exception allowed.

STATUTORY MANNER OF REMOVING CAUSES FROM A DISTRICT TO THE SUPREME COURT OF WASHINGTON TERRITORY.

Petitioners further say that these causes were removed to the Supreme Court by a notice given in open Court at the time of the ruling or decision of said District Court on demurrer, and was so entered in the journal

by order of said Court, *in said ruling or decision* aforesaid, by virtue of the Act entitled: "An Act in relation to the *removal of causes* to the Supreme Court, approved November 23d, 1883," which, for convenience of the Court, we insert here:

"SECTION 1. Be it enacted by the Legislative Assembly of Washington Territory, that any person desiring to remove *a cause* from any District Court of Washington Territory, may do so, either in person or by his attorney of record, and in the following manner: Such person or attorney may give *notice in open Court*, or at Chambers, that he appeals such cause to the Supreme Court of the Territory. Such notice shall, by order of the Court or judge having jurisdiction of the cause, be entered in the journal of such Court, *and no other service or notice of process shall be required*, and *thereupon* the clerk of such Court shall make and certify a full and complete transcript of said cause, including the journal entries thereunto appertaining, and cause such transcript to be filed with the clerk of the Supreme Court within the time allowed by law; and thereupon the *Supreme Court* shall have *complete* and *perfect jurisdiction of such cause.*

"SEC. 2. That the Supreme Court shall hear and determine all causes removed thereto, in the manner hereinbefore provided, *upon the merits thereof*, disregarding *all* technicalities.

"SEC. 6. All Acts and parts of Acts, so far as they conflict herewith, are hereby repealed. Approved November 23d, 1883."

Your petitioners submit that, any cause *at law*, *in equity*, *or mixed law and equity*, can be removed to the Supreme Court of the Territory in

the manner provided for by the above act. And that after *notice* of appeal, *given in open Court* and entered in the journal, all is done that is required by the act to be done by the appellant. That no *notice* or *assignment of errors* is required in *any cause* thus removed ; "to give the Court *complete* and *perfect jurisdiction*."

And that it was the duty of the Court under the 2d section of the act to *pass* on the "*merits* of the *cause*, disregarding all technicalities."

Your petitioners most respectfully submit that this cause (with the other two) although brought as an action at law, were under the Code, par. 445, transformed to a cause in Chancery by the interposition of the fourth separate answer or equitable defence, which is in the nature of a cross-bill in equity seeking equitable relief against legal title ; hence, where the law authorizes the mingling of law and equity in one suit the same rules are to be applied as if the suit were begun in equity.

See Sower *vs.* Weaver, 78 Penn. St., 443.

Williams *vs.* Murphy, 21 Minn., 534.

Code, Wash. Ter., par 445.

And as it is apparent from the whole answer that upon the *sufficiency* of the matters and things set forth in said equitable, or fourth separate answer and defence, *depends* the only right or title of defendants either at *law or equity;* and if the " matters pleaded did not display facts sufficient to constitute a defence of any description," as held by the Supreme Court on *motion* to dismiss the appeal, then all claim by defendant to the *fee* "*ex. necessitate rei*" falls to the ground.

51 Cal., 178.

Your petitioners further claim that no Court has authority to *eliminate* from the answer an alleged equitable defence (on a *motion to dismiss*), in order to hold the cause to be *an action at law* as a pretext for dismissal, "according to Rule 5 of said Court"; and it would be also in *violation* of the provisions of the statute of 1883 aforesaid, for the removal of *causes* to the Supreme Court of the Territory.

RULE XI.

"Technical objections to hearing on merits, exceptions or objections to transcript, bonds, notices of appeal or writ of error or the service thereof, or to writs of error or the return thereof, and all technical exceptions or objections to the record, tending to prevent the hearing of a cause on its *merits, must be taken* and plainly stated in the *printed briefs* of appellees or defendants in error, or the *same will not be regarded.*" . . . .

Petitioners aver that the printed brief of appellee was was filed in said cause in said Supreme Court for the July term, 1885, and *no* exceptions or objections whatever had been taken or stated in such printed brief as to the appeal or notice thereof.

Rule 5 of said Court in opposition to the provisions of said statute is held as binding, while Rule XI, in accord with law, is set aside by said Court.

Your petitioners further represent that about the 28th of July, 1885, before the close of the term, filed in said Supreme Court their petition to vacate the order of dismissal, and for reinstatement of said cause, and for final hearing of the merits, and as grounds therefor the following reasons were assigned:

1st.

"That the laws of the United States authorize a commingling of jurisdictions, legal and equitable.

18 U. S., 27.

2d.

That the defence can plead legal and equitable defences, or both.

Code, section 83.

3d.

That when a plea is addressed to the Judge of the District Court where the action is brought, the *relief* sought is of an equitable nature.

Code, section 76.

4th.

That when equitable relief is sought, or *chancery jurisdiction* has been exercised, the *cause shall* be reviewed before the Supreme Court *on appeal.*

Code, 445.

The Code does not require that the aquitable relief sought should be a *good plea*—a *sufficient plea*—or prove an *effectual plea.*

The fourth separate answer and defense was addressed to the judge of the Court as a bill in equity, seeking *equitable relief.* The *overruling* of the demurrer by the district court to this attempt to plead an equitable defense, sustained *that defense*, and thus the district court *did necessarily act in the capacity of chancellor.*

Thus because *equitable relief was sought* and *chancery jurisdiction exercised*, your petitioners as plain-

tiffs below, were *required* by the *Code* to bring this case here by *appeal* to secure its review.

ERRORS.

Therefore, your petitioners claim that this honorable Court erred in ruling that the answer sets out four affirmative defenses, because the *first* pleading *title* in defendant is only equivalent to a general denial of title in the plaintiffs.

Marshall *vs.* Shafter, 32 Cal., 176.

II.

That this Court *erred* in the total *elimination* from the answer of the alleged equitable defense, by passing on the insufficiency of said fourth separate answer and defense *upon a motion to dismiss the appeal.*

III.

That this Court *erred* in holding that the district court did not necessarily act as chancellor. In the face of the fact that said district court did *overrule* the demurrer to said *equitable defense.*

IV.

That this Court erred in holding that the decision of the court below was a decision at law, and that errors should have been assigned.

(See Act of Nov. 23, 1883.)

V.

That this Court erred in dismissing the appeal for want of jurisdiction.

Wherefore your petitioner asks for the vacation of the order of dismissal of the appeal in the above named causes, and for their reinstatement for trial and final judgment on the merits by this Court."

LEANDER HOLMES,
Petitioner and Attorney.

That thereafter said Supreme Court on July 31st, 1885, did decline to hear further argument on said petition for re-hearing and final judgment on the merits, and dismissed the petition, and without further action adjourned said Supreme Court for the term. And said appeals remain dismissed with judgments against your petitioners for costs.

Your petitioners further submit that said fourth separate answer and defense is but a plea in the nature of a cross-bill in equity, and fully sets forth all that ever was done, or that ever took place, as to the means and methods, by and through which appellee or appellees got possession of this land, or lots of land, and by virtue of which and through which alleged facts as set forth in said fourth separate answer and defence only can said appellee or appellees claim or pretend to claim any thing.

And your petitioners further state that they are entirely without remedy in the premises, unless it is confered by the interposition of this Honorable Court.

That they are advised by counsel and varily believe that in the ruling on demurrer and judgment of the said District Court, and also in the decision of said Supreme Court dismissing said appeal, errors exist, whereby the substantial rights of petitioners as plaintiffs and appellants therein, were, and are,

materially and adversely affected; and if said dismissal and judgment thereon are permitted to become final as against these petitioners as appellants therein, an irreparable injury and injustice will be done them.

That the appeal or removal of said causes by these petitioners as plaintiffs therein was not taken for delay, but for the purpose of having corrected the ruling and judgment on demurrer in the district court, whereby their substantial rights have been affected, and to the end that justice may be done them. Nor is this application for either annoyance or delay, but that petitioner's rights may be protected, errors in said cause by said Supreme and district courts corrected, and justice done them in the premises. That the amount in controversy in each of said three causes is largely in excess of $5,000 exclusive of costs.

Wherefore your petitioners pray that a peremptory mandamus may issue, directed to the said Supreme Court of Washington Territory, and to the Honorable Roger S. Green, Chief Justice, and S C. Wingard, John P. Hoyt and George Turner, Associate Justices, commanding and enjoining them to set aside the order and judgment of said Supreme Court, made and entered in the cause of L. D. Brown et al *vs.* William Rank, No. 422, and in the cause of L. D. Brown et al *vs.* G. T. McConnell, No. 423, and in the case of L. D. Brown et al *vs.* William C. Hazard, No. 424, on the 18th of July, 1885, aforesaid, dismissing said appeals and rendering judgments against these petitioners as appellants herein for costs, and to *reinstate said appeals and causes* in said Supreme Court, and hear and

decide said causes on *their merits,* and for such other and further relief as petitioners may be entitled to by virtue of the premises, and for their reasonable costs and disbursements herein, and as in duty bound your petitioners will ever pray.

LEANDER HOLMES,
Counsel for Petitioner.

STATE OF OREGON, }
County of Multnomah. } ss.

I, L. D. Brown, being duly sworn, do depose and say, that I am one of the petitioners in the above entitled application; that I have heard the said petition read, and the same is true as I verily believe.

Signed, L. D. BROWN.

Subscribed and sworn to before me, this 5th day of December, 1885.

(SEAL) I. N. SANDERS, Co. Clerk.
By W. S. Wood, Deputy.